Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979
No. 79-943

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

-VS-

LINZIE GARDNER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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PETITION FOR A WRIT OF CERTIORARI

The People of the State of Michigan, Petitioner, pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Michigan entered in the above entitled cause on June 25, 1979, rehearing denied September 28, 1979.

CITATION OF OPINIONS BELOW

Michigan Supreme Court. The Order granting delayed application for leave to appeal and framing the issue to be considered on appeal is reported at 402 Mich 940 (1978). Appendix A.

The opinion of the Michigan Supreme Court dated June 25, 1979 is reported at 406 Mich 369; 279 NW2d 785 (1979). Appendix B.

The last paragraph of the Supreme Court opinion indicates that a new court rule would be promulgated to protect the rights of defendants to the effective assistance of counsel in joint representation situations. A special order was issued June 25, 1979 containing this proposed court rule, published at 406 Mich 1123 (1979). Appendix C.

The order denying Petitioner's motion for rehearing was entered September 28, 1979 and is reported at 407 Mich 1150 (1979). Appendix D.

Michigan Court of Appeals. The order granting Petitioner's motion to affirm was entered June 7, 1976 and is not published. Appendix E.

JURISDICTION

The judgment of the Supreme Court of Michigan was entered on June 25, 1979 and a timely motion for rehearing was denied by an order dated September 28, 1979.

The jurisdiction of this court is invoked under 28 USC Sec 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Is the Sixth Amendment right to effective assistance of counsel violated by joint representation of defendants with differing degrees of culpability where the testimony of both defendants gave identical accounts of their participation in the offense?

2. Did the Court below err in finding that joint representation deprived Defendant of the Sixth Amendment right to effective assistance of counsel with no showing that counsel's actions at trial were based on consideration of co-defendant's interest to the detriment of Defendant's interests?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution for the United States of America, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Defendant Linzie Gardner, Respondent in this Court, and Michael Kidder, were jointly charged with assaulting Victor Schultz with intent to commit murder, MCL 750.83; MSA 28.278. At the time of the assault, both defendants were inmates in the State Prison of Southern Michigan and Victor Schultz was employed as a dining room officer at the prison. Both defendants were indigent and attorney William F. Goler was appointed by the Court to represent them.

Attorney Goler represented both defendants throughout the case. Defendants were jointly arraigned in Circuit Court on August 20, 1974 at which time attorney Goler brought to the Court's attention that the cases were companion cases and requested that they be assigned to one judge. (T p 2).

Jury trial was had November 12 to November 13, 1974 resulting in the verdict of Gardner guilty of assault with intent to commit murder and Kidder guilty of assault with intent to commit great bodily harm less than murder.

At trial, Victor Schultz, the prison guard assaulted, testified that he was making a fire check of the carpenter shop in the prison when he came upon Gardner. Gardner put a choke hold on Schultz and wrestled Schultz to the floor. (T pp 51, 54). Schultz testified that Gardner then called for help and Kidder came into view. While Gardner was still grappling with Schultz, Gardner told Kidder to hit Schultz and Schultz felt several blows to the back of his head and neck after which he was unable to remember anything until he regained consciousness in the hospital. (T p 56).

Inmate Bobby Haggitt testified that he saw Gardner and Kidder leave the carpenter shop together, shortly after the assault had occurred. Haggitt testified that he saw blood on Gardner's hands (T p 102), and saw Gardner change shirts with another inmate. (T pp 102, 103). Inmate George Colby testified that Gardner informed him that he had been in a fight with an officer, that Gardner had struck the guard with a two by four (T p 121), that he was with Kidder at the time (T pp 115, 118), that the guard looked like he was dead after the assault (T p 119), and that Gardner wanted Colby to tell the prison officials that Gardner received the cut on his forehead while wrestling with Colby. (T p 120). Inmate George Harris testified that he saw both Gardner and Kidder immediately after the assault and that Gardner was cut and bleeding at the time. (T pp 145-146). Gardner told Harris that he had a "beef" (T p 147) and that Gardner then changed his shirt with another inmate (T p 148).

Both defendants testified at trial. Both admitted to being in the carpenter shop when Victor Schultz entered and both gave identical accounts of the assault. Both defendants testified that Gardner first placed Schultz in a restraining hold, that Gardner called to Kidder to hit Schultz, that Kidder then hit Schultz once on the head with a board, and

that Gardner then took the board from Kidder and struck Schultz several more times in the head with the board. Gardner testified that Schultz later tried to get up from the floor and that Gardner then hit him several more times in the head with a crowbar. (T pp 291, 302). Kidder testified he had gone into another room and did not see Gardner hitting Schultz with the crowbar.

The only indication of potential conflicting interests noted by the Michigan Supreme Court occurred when the prosecution attempted to impeach Gardner by asking him whether he had ever told anyone he was going to take the blame for defendant Kidder. (T p 307). Gardner answered the prosecutor's question by denying ever having made such a statement. (T p 308). After Gardner had answered the question, defense counsel interposed an objection saying that any such statement by Gardner would adversely affect Kidder (T pp 309-310), and that Kidder would be prejudiced by such a statement. (T p 311). In discussing the question, the trial court noted that the only danger involved was the question of what effect Gardner's prior statement would have on Kidder. (T p 312). The trial court then stated that there was a conflict in that the statement of Gardner saying he wanted to do something for Kidder would imply that something had to be done for Kidder. (T p 313). The trial court considered the conflict resolved when the prosecutor said he would not cross-examine Gardner concerning that part of the statement. (T pp 314, 315). The Michigan Supreme Court concluded that this resulted in the defendant's attorney objecting to the admission of a statement which "at least inferentially" would cast Gardner in a more favorable light.

The Michigan Supreme Court opinion first noted that the defenses of Gardner and Kidder "were not necessarily inconsistent" but that it should have been apparent to defense counsel that the testimony would portray differing degrees of culpability and further noted that in the course of the trial the defendants' single attorney "felt it necessary to

draw a line of demarcation as to the relative culpability of his two clients." On the above bases the Michigan Supreme Court concluded that joint representation deprived Gardner of the effective assistance of counsel.

No post-conviction motions were made in the trial court, as a result there is no record of testimony by Gardner, Kidder or attorney Goler to support Defendant's claim that a conflict of interest existed at trial.

REASONS FOR GRANTING THE WRIT

This Court in *Holloway* v *Arkansas*, 435 US 475; 98 S Ct 1123; 55 L Ed 2d 426 (1978) recognized that requiring a single attorney to represent co-defendants is not *per se* violative of constitutional guarantees of effective assistance of counsel. Citing Justice Frankfurter's dissenting opinion in *Glasser* v *United States*, 315 US 60, 92; 62 S Ct 457; 86 L Ed 680 (1942) this Court in *Holloway* also recognized that in some cases certain advantages might accrue from joint representation.

This Court in *Holloway* held that an attorney's request for appointment of separate counsel based on a conflict of interest should be granted, on the basis that the attorney is in the best position to determine the conflict, that the attorney has an obligation to advise the Court of such problems, and on the basis that such declarations by attorneys are as if they were under oath. This Court in *Holloway*, in further interpreting the *Glasser* decision found that the refusal of the Court in *Glasser* to reverse the conviction of Glasser's co-defendant Kretske was due to the fact that Kretske did not raise his own Sixth Amendment challenge to the joint representation. This Court in *Holloway* held that in that context the Court required a showing of prejudice before reversal is warranted on grounds of ineffective assistance of counsel.

In the instant case, defense counsel representing both defendants raised no objection to being appointed to

represent both defendants, nor gave any indication to the court that any potential conflict of interest existed. Indeed, at arraignment defendants' counsel requested that the defendants' cases be assigned to the same judge. (T p 3). Petitioner asserts that defense counsel, under the standards laid down by *Glasser* v *United States*, *supra*, and *Holloway* v *Arkansas*, *supra*, was required to make a showing of prejudice arising from joint representation.

The Michigan Supreme Court premised reversal of Gardner's conviction on the basis that it should have been apparent to defense counsel that the testimony would portray differing degrees of culpability on the part of the co-defendants, that the defense counsel at trial distinguished the relative culpability of the two defendants and that defense counsel objected to impeachment of Defendant Gardner by the prosecutor with a prior statement on the basis that such impeachment would harm co-defendant Kidder.

Joint representation of co-defendants of unequal culpability does not suggest a conflict of interest unless there is some indication in the record that counsel abandoned his efforts on behalf of one defendant in order to save the other. In an opinion written by Judge, now Justice Stevens, and joined by the late Supreme Court Justice Tom Clark, the Seventh Circuit Court of Appeals held in *United States* v *Mandell*, 525 F2d 671 (CA7, 1975) that the Sixth Amendment guarantee to assistance of counsel commands no rule against joint representation of defendants of unequal culpability. This rule has been adopted whether the issue is framed in terms of unequal culpability of defendants or unequal evidence against defendants. *United States* v *Miller*, 463 F2d 600 (CA1, 1972), *United States ex rel Ross LaVallee*, 448 F2d 552 (CA2, 1971), *United States* v *Gallagher*, 437 F2d 1191 (CA7, 1971), *Ross* v *State*, Ind ; 377 NE2d 634 (1978).

Dicta in a recent Second Circuit Court of Appeals' opinion in *United States* v *DeFillipo*, 590 F2d 1228 (CA2, 1979),

without discussing that circuit's earlier contrary holding in *United States ex rel Ross LaVallee*, *supra*, suggests that if the evidence incriminates one co-defendant more than another co-defendant the testing of that evidence by the joint attorney to show that the evidence does not strongly implicate one defendant would only implicitly highlight the incriminating nature of the evidence as against the other co-defendant. This reasoning, as the reasoning of the Michigan Supreme Court in the instant case, fails to recognize that the problem arising from joint defendants with differing culpability is not attributable to joint counsel. The appointment of separate counsel would still result in the culpability of the more culpable co-defendant being implicitly highlighted, only this time through co-defendant's separate counsel. Cross-examination or argument by joint counsel emphasizing the weakness of evidence against one defendant does not increase the evidence against or culpability of the co-defendant and can harm the co-defendant only where the defendant's strategy is to direct the blame to the co-defendant. In the instant case, where both defendants testified to an identical account of the assault it cannot be asserted that this was a strategy available to either defendant, unless separate counsel were to suborn perjury. *People* v *Jovicevic*, 63 Ill App 3d 106; 379 NE2d 665 (1978) held that where the testimony of each co-defendant established the different roles of the defendants in the assault without contradiction, no conflict of interest was established. As in the instant case, completely compatible testimonial accounts by the two defendants of each other's culpability bespeaks the absence of conflict.

To base a finding of conflict on the different amount of evidence against co-defendants would eliminate joint representation, since there will always be somewhat different evidence against different defendants. *People* v *Lopez*, 70 Ill App 3d 213; 26 Ill Dec 751; 388 NE2d 466 (1979). Similarly, since joint defendants in almost all cases will have differing degrees of culpability, since no two defendants can do the same act, the holding of the Michigan Supreme Court in the instant case amounts to the adoption of a *per se* rule barring

joint representation, thus directly conflicting with this Court's holdings in *Glasser* and *Holloway*. State courts have consistently held that differing degrees of evidence or culpability between co-defendants where represented by the same counsel does not in and of itself create a conflict. *Commonwealth* v *Bolduc*, Mass ; 378 NE2d 661 (1978), *State* v *Henry*, Mont ; 582 P2d 321 (1978), *People* v *Tillman*, 59 Mich App 768: 229 NW2d 922 (1975), *People* v *Cook*, 13 Cal 3d 663; 119 Cal Rptr 500; 532 P2d 148 (1975), *People* v *Guitierrez*, 511 P2d 20 (Colo S Ct, 1973), *State* v *Arce*, 107 Ariz 156; 483 P2d 1395 (1971).

Further, development of this differing culpability by joint counsel does not bespeak a conflict. Counsel's attempt to minimize co-defendant's role did not result in a conflict of interest where the defendant admitted to the lesser role of the co-defendant. *State* v *Henry, supra*. It has also been held that there is no conflict of interest for counsel to suggest that co-defendant's involvement stemmed from association with the defendant who had a record of prior felonies. *People* v *Bryant*, 275 Cal App 2d 215; 79 Cal Rptr 549 (1969). Devotion of the major portion of counsel's efforts to the one defendant with any semblance of a defense fails to show a conflict. *United States* v *Long*, 415 F2d 307 (CA6, 1969). The fact that counsel points out that the State's case against the co-defendant was weaker than that against the defendant does not support a claim that the defendant was prejudiced by joint representation. *People* v *Tillman*, 59 Mich App 768; 229 NW2d 922 (1975).

Apart from the differing culpability between Gardner and Kidder, the only grounds found by the Michigan Supreme Court to support a finding of conflict of interest come from defense counsel's objection to the prosecutor's impeachment of Defendant Gardner with a prior statement. The prosecutor asked Defendant Gardner on cross-examination whether he had told a police detective that he wanted to take the blame for co-defendant Kidder. Defendant Gardner answered "I didn't tell him that, no." (T p 307). After Gardner had

answered the prosecutor's question in the negative, defense counsel objected on the basis that any such statement by Gardner would prejudice co-defendant Kidder. The actual statement made by Gardner by which the prosecutor was attempting to impeach Gardner is found in a "production of admission" filed by the prosecutor in Circuit Court. This statement by Gardner given to a police detective is to the effect that Gardner and Kidder were together at the time that the assault occurred, but that they did not participate in the assault and that the cut over Gardner's right eye came from wrestling with inmate George Colby. The production of admission form concludes with the statement "Linzie told me earlier that he wanted to 'do something for Kidder' if he could." Appendix F.

From this record, the Michigan Supreme Court concluded:

> . . . Gardner made a statement to the police in which he, inter alia, at least implied that he was willing to take the blame for the crime in an effort to aid Kidder. * * * Thus, we have a situation in which the attorney objected to the admission of a statement which, at least inferentially, would cast Gardner in a more favorable light. . . . (406 Mich at 372).

The record directly contradicts these findings of the Michigan Supreme Court. Not only did Defendant Gardner deny on cross-examination that he had made any statement that he was willing to take the blame for the crime in order to aid Kidder (T p 307), the record also indicates in the production of admission form that Gardner had made no such statement. The source of the inference or implication favorable to Gardner, that he was willing to take some of the blame for Kidder, comes solely from the prosecutor's question on cross-examination. The question itself was proper, seeking to draw an arguable inference from Gardner's statement. Only if Gardner had adopted this arguable inference, which he did not, can it be asserted that his statement that he wanted to help Kidder meant that he was willing to accept

the blame for Kidder's acts. Gardner's statement contained in the production of admission form, that he wanted to help Kidder is made in conjunction with a false alibi framed by Gardner. This alibi was abandoned by Gardner at trial where he testified to his participation in the assault, at the same time implicating his co-defendant as a co-participant. When Gardner stated he wanted to help Kidder, he was obviously accepting blame for no one, but rather denying complicity in the assault and "helping" Kidder by naming him in his exculpatory alibi.

Petitioner wishes to stress that the identical nature of Defendant Gardner and co-defendant Kidder's testimony places a severe limit on any claims of conflict of interest. It has been held that where a common defense is presented by co-defendants represented by the same counsel, testimony by the defendants which is consistent and establishes the same facts surrounding the crime, provides further support for the conclusion that common counsel was not laboring under a conflict of interest. *United States* v *Foster,* 469 F2d 1 (CA1, 1972), *United States* v *Cox,* 508 F2d 317 (CA8, 1978).

Any suggestion of potential conflict or the abandonment of any available defense to avoid a conflict must be judged in light of the defendants' identical trial testimony. Defendant Gardner should be estopped from claiming any possible theory of the case which would be contrary to his trial testimony. To claim that Gardner forfeited an available trial strategy of laying greater culpability on Kidder, in contradiction to Gardner's testimony at trial, would require that false evidence be offered, that witnesses known to be testifying truthfully be impeached, and that witnesses be allowed to testify falsely in order to develop this "available alternate strategy." See ABA Standards for Criminal Justice, the Defense Function, Sec 7.5(a) 7.6(b) 7.7, Michigan Code of Professional Responsibility DR 7-102(A)(2), (4),(6),(B)(1).

In *United States ex rel McClindon* v *Warden,* 575 F2d 108 (CA7, 1978) the Seventh Circuit noted that at an evidentiary hearing the trial attorney for joint defendants testified that prior to trial both defendants told him the same version of events, both admitting responsibility for the murder. The Court of Appeals remanded to District Court for a determination of whether the defendants had so informed the attorney, stating that the apparent plausible defense that defendant McClindon was an innocent bystander and the co-defendant the murderer would not be a defense open to defendant McClindon if he had admitted to his attorney that he was not an innocent bystander and that he was responsible for the murder. If McClindon had admitted joint responsibility to his attorney, then the attorney would have no cause to believe that a conflict of interest existed, nor would an actual conflict exist despite the appearance from the evidence at trial that the defendant could have asserted that he was an innocent bystander.

The same reasoning is applicable in the instant case, only with more force, since in the instant case this Court has available for scrutiny the sworn testimony of both co-defendants concerning their complicity in the assault. Due to the nature of Gardner's trial testimony, defense counsel did not have as an available strategy the course of allowing the prosecutor to impeach Gardner with a non-existent statement in order to "inferentially" cast Gardner in a better light. Since Gardner denied making the statement there was nothing which would reflect favorably on Gardner, and thus, no conflict when counsel objected to the cross-examination to protect Kidder. Given the non-existence of the statement, any conflict or prejudice arising therefrom is vaporous.

A similar analysis is found in *Commonwealth* v *Bracero,* Pa Super ; 396 A2d 709 (1978). In *Bracero* the joint defendants offered identical testimony but in post-conviction proceedings alleged a conflict of interest. The Court in *Bracero* noted that even if it were conjectured that one of the defendants perjured himself during the trial, there is no showing that their common defense counsel was the cause of such perjury. In the instant case, even if it is conjectured

that Gardner perjured his testimony at trial in order to protect Kidder, this still does not establish the denial of effective assistance of counsel until such time as defendant can show that joint representation was the source of Defendant's perjury.

Thus, even had Defendant Gardner in the instant case testified in order to exculpate co-defendant Kidder, an assumption which is merely speculative conjecture in the absence of any challenge by Defendant of his trial testimony, this does not amount to a conflict of interest depriving Defendant of effective assistance of counsel unless it can be shown that Gardner would not have chosen this course had he been represented by separate counsel.

It has been consistently held that where both co-defendants take the stand and offer identical testimony concerning the charged offense, there is no indication of conflict of interest. *United States* v *Medel*, 592 F2d 1305 (CA5, 1979), *Burston* v *Caldwell*, 506 F2d 24 (CA5, 1975), cert den 421 US 990; 95 S Ct 1995; 44 L Ed 2d 480, *United States* v *Fannon*, 491 F2d 129 (CA5, 1974) cert den 419 US 1012; 95 S Ct 332; 42 L Ed 2d 286, *People* v *Jovicevic*, 63 Ill App 3d 106; 479 NE2d 665 (1978), *Ross* v *State*, Ind ; 377 NE2d 634 (1978), *State* v *Henry*, Mont ; 582 P2d 321 (1978), *State* v *Turner*, La ; 365 So2d 1352 (1979), *State* v *Koller*, 87 Wis 2d 253; 274 NW2d 651 (1979).

The same results have been reached in Pennsylvania in *Commonwealth* v *Resinger*, 432 Pa 398; 248 A2d 55 (1968), and *Commonwealth* v *Small*, 434 Pa 497; 254 A2d 509 (1969) but over the vigorous dissent of Justice Roberts who would hold that any time a co-defendant implicates the defendant, even if the defendant adopts the co-defendant's implication, a conflict of interest must exist since a single attorney cannot contemplate a strategy which would include vigorous cross-examination of a kind to discredit his testimony. This argument, however, ignores the effect of the defendant's testimony accepting and adopting the inculpatory portions of co-defendant's testimony. As discussed in *United States ex*

rel McClindon v *Warden, supra,* and *Commonwealth* v *Bracero,* supra, a strategy which would run contrary to the defendant's sworn testimony is a strategy not available to the attorney since it would require the attorney to suborn perjury or to impeach testimony known by the attorney to be truthful.

In *Sullivan* v *Cuyler,* 593 F2d 512 (CA3, 1979), cert gtd 26 Cr L 4002 it was held that although the strategy chosen by joint counsel would have been legitimate if chosen by separate counsel, a conflict of interest still existed in that at an evidentiary hearing after trial it was indicated that the attorney chose the strategy out of consideration for a co-defendant yet to be tried. In the instant case, due to the defendants' identical testimony and the strong evidence against Defendant Gardner, including testimony by inmate Colby, named by Gardner as an alibi witness, that Gardner had admitted beating a guard, it is clear that the strategy undertaken by the single defense counsel to attempt to negate any intent to murder, was legitimate. Unlike *Sullivan* v *Cuyler,* however, there is absolutely no record indication that this strategy was undertaken in an attempt to protect Kidder. Defendant never raised the issue of ineffective assistance of counsel in a motion for new trial as is required under Michigan procedure, *People* v *Ginther,* 390 Mich 436; 212 NW2d 922 (1973). As a result there is no evidentiary record from which defendant can demonstrate the existence of a conflict, a necessary showing in view of counsel's lack of objection to joint representation at trial.

The opinion by the Michigan Supreme Court finding that the Defendant was deprived effective assistance of counsel due to joint representation forges an unwarranted new interpretation of the Sixth Amendment. The Michigan Supreme Court based its finding of ineffective assistance of counsel on the basis of the differing culpability of the co-defendants, a basis which has been rejected by several Federal circuits and state courts. Given the defendants' all but identical testimony, attacking the co-defendant would

also be attacking the defendant. The existence of differing culpability between co-defendants and the development of that difference by joint counsel at trial is not sufficient to establish a conflict of interest.

Given Defendant's lack of objection at trial to joint representation Defendant Gardner under *Glasser* and *Holloway* is required to make a showing that counsel's actions at trial were based on consideration of the co-defendant's interest to the prejudice of defendant's interests before there can be found a denial of effective assistance of counsel. Defendant has failed to develop an evidentiary record to show that some decisions made by defense counsel were designed to protect the interest of Gardner's co-defendant to the detriment of Gardner's interests. The only "conflict" observed by the Michigan Supreme Court involving counsel's objection to impeachment of Gardner with a non-existent statement which "inferentially" placed Gardner in a better light is vaporous in view of Gardner's trial testimony which contradicted any such beneficial inference.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,
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Dated: November 14, 1979

APPENDIX

APPENDIX "A"
ORDER OF THE MICHIGAN SUPREME COURT
(Filed May 8, 1978)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 8th day of May in the year of our Lord one thousand nine hundred and seventy-eight.

Present the Honorable
THOMAS GILES KAVANAGH,
Chief Justice,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
MARY S. COLEMAN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices

CR 18-318a

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
-vs- 58924
COA: 24792:
LC: 74-001795-FY

LINZIE GARDNER,
Defendant-Appellant.

On order of the Court, the delayed application for leave to appeal is considered, and it is GRANTED, limited to the following issue: Whether defendant was denied his right to effective assistance of counsel by joint representation of him and his codefendant. Within this question, counsel should address themselves to the proper standard for reviewing such claims.

Defendant shall file with Jackson Circuit Court an affidavit concerning his present financial status (see guidelines at 387 Mich xxxi). The prosecutor shall be

furnished a copy of the financial affidavit and may challenge defendant's asserted indigency within 20 days after receiving the affidavit. The challenge, if brought, shall be resolved at a hearing before the Jackson Circuit Court at which the prosecution, defendant and counsel for defendant shall appear personally to aid the Court's inquiry. The Jackson Circuit Court, upon a finding of indigency, shall continue the appointment of the State Appellate Defender Office as counsel for defendant and shall furnish any portion of the record counsel may require.

STATE OF MICHIGAN—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 8th day of May in the year of our Lord one thousand nine hundred and seventy-eight.

[SEAL]

(s) CORBIN R. DAVIS
Deputy Clerk

APPENDIX "B"
OPINION OF THE MICHIGAN SUPREME COURT
(Filed June 25, 1979)

STATE OF MICHIGAN
SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-VS- 58924

LINZIE GARDNER,
Defendant-Appellant.

Per Curiam. We granted leave to appeal to consider whether the defendant Linzie Gardner was denied his right to effective assistance of counsel because of the joint representation in this case. We conclude that he was.

I.

Linzie Gardner and Michael Kidder were charged with assault with intent to commit murder in an attack made by them on a prison guard while they were incarcerated in State Prison of Southern Michigan. At trial, both were represented by the same attorney. Gardner was convicted of assault with intent to commit murder and was sentenced to a term of 50 to 75 years, to be served consecutively to the sentence he was serving at the time of the commission of the offense. Kidder was convicted of assault with intent to do great bodily harm less than murder and was sentenced to a term of 5 to 10 years in prison, to run concurrently with the term he was serving at the time of the commission of the offense.

Gardner appealed to the Court of Appeals. The prosecutor filed a motion to affirm. By order dated June 7, 1976, the Court of Appeals granted the prosecution's motion.

II.

At trial, both Gardner and Kidder admitted that each committed an assault on the prison guard. The prison guard who was assaulted testified that the first blow which was struck was an "awful hard blow, terrible blow". Kidder admitted striking the first blow. Kidder's testimony, however, was that the blow which he struck was not very hard. Gardner corroborated Kidder's version: he likened the blow which Kidder struck to a "baby tap". Gardner admitted hitting the prison guard over the head with a board about four times and subsequently striking the prison guard with a crowbar. Both Gardner and Kidder, while admitting their participation in the assault, contended that neither intended to murder the guard who had discovered them in an area of the prison where they were not supposed to be.

While the defenses of Gardner and Kidder were not necessarily inconsistent, it should have been apparent to defense counsel at the very outset of this case that the testimony would portray differing degrees of culpability, most notably less culpability on the part of Kidder and greater culpability on the part of Gardner. Furthermore, the record reveals that at some time after the commission of the offense, Gardner made a statement to the police in which he, *inter alia*, at least implied that he was willing to take the blame for the crime in an effort to aid Kidder. When the prosecutor attempted to impeach Gardner at trial by virtue of this statement, defense counsel objected on the basis that the statement would prove harmful to Kidder. Thus we have a situation in which the attorney objected to the admission of a statement which, at least inferentially, would cast Gardner in a more favorable light on the basis that to admit the statement would harm counsel's other client, Kidder. The trial judge recognized the potential for conflict, but the matter ended when the prosecutor said that he would not use the statement.

In addition, the closing argument of defense counsel indicates that he emphasized the limited role of Kidder in the

assault and indeed urged the jury to find Kidder guilty of nothing greater than felonious assault. On the other hand, in closing argument, defense counsel felt compelled to indicate to the jury:

"* * * and that is my duty again as counsel to point out to you that if either one of these men, and we are talking primarily about Linzie Gardner, if Linzie Gardner had wanted to kill Officer Schultz—number 1, he would have gone back to see whether he was living, and number 2—if he had gone back and wanted to kill him and found that he was breathing, he would have 'finished him off' in the word of Mr. Grant."

Thus, a single defense attorney, representing both the defendant and his codefendant, felt it necessary to draw a line of demarcation as to the relative culpability of his two clients. We conclude that under the circumstances of this case, joint representation deprived Gardner of the effective assistance of counsel. *People* v *Bentley*, 402 Mich 121; 261 NW2d 716 (1978). Accordingly, we reverse the defendant's conviction and remand for a new trial.

In addition, we have concluded that the time has come for the promulgation by this Court of a procedure whereby the rights of defendants to the effective assistance of counsel in a joint representation situation are protected. Accordingly, a proposed amendment to GCR 1963, 785 will be published for comment under GCR 1963, 933.

Reversed and remanded for new trial.

(s) MARY S. COLEMAN
(s) BLAIR MOODY, JR.
(s) CHARLES L. LEVIN
(s) THOMAS GILES KAVANAGH
(s) G. MENNEN WILLIAMS
(s) JOHN W. FITZGERALD
(s) JAMES L. RYAN

APPENDIX "C"
PROPOSED AMENDMENT OF GCR 1963, 785.
(Filed June 25, 1979)

RULE 785. CRIMINAL PROCEDURE. 1—.3 (Unchanged.)

.4 Advice on the Assistance of Counsel; Appointment; Joint Representation.

(1)-(3) (Unchanged.)

(4) Whenever two or more defendants who have been jointly charged or whose cases have been consolidated are represented by the same lawyer, the court shall inquire into any potential conflict which might jeopardize the right of each defendant to the fidelity of his lawyer. The same lawyer may not represent two or more defendants unless

(a) the lawyer proposing to represent two or more defendants states, on the record before trial, that joint representation will in all probability not cause a conflict of interest and states reasons for his conclusion; and

(b) the defendants state, on the record, after the court's inquiry and the lawyer's statement, that it is their desire to proceed with the same lawyer.

If an unanticipated conflict occurs during trial, a lawyer who is representing two or more defendants shall immediately inform the court; if the court agrees that a conflict has arisen, it shall appoint an additional lawyer or lawyers or afford one or more of the defendants the opportunity to retain separate counsel, as the case may require.

5—.13 (Unchanged.)

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments

will be substantively considered and your assistance is appreciated by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in GCR 1963, 933. Comments on this proposal may be sent to the Supreme Court clerk within 60 days after it is published in the State Bar Journal.

Staff Comment: The proposed amendment reflects the Court's decision in *People* v *Gardner*, 406 Mich 369 (1979). It is drawn, in part, from the ABA Project on Standards for Criminal Justice, Standards Relating to The Administration of Criminal Justice, The Defense Function (Compilation, 1974), §3.5(b), p 123, and The Function of the Trial Judge, § 3.4(b), p 171.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

APPENDIX "D"
ORDER OF THE MICHIGAN SUPREME COURT
(Filed September 28, 1979)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 28th day of September in the year of our Lord one thousand nine hundred and seventy-nine.

Present the Honorable
MARY S. COLEMAN,
Chief Justice,
THOMAS GILES KAVANAGH,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-vs- 58924

COA: #24792
LC: #74-001795 FY

LINZIE GARDNER,
Defendant-Appellant.

In this cause a motion for rehearing is considered and, on order of the Court, it is hereby DENIED.

STATE OF MICHGAN—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and

that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 28th day of September in the year of our Lord one thousand nine hundred and seventy-nine.

[SEAL]

(s) CORBIN R. DAVIS
Deputy Clerk

APPENDIX "E"
ORDER OF THE MICHIGAN COURT OF APPEALS
(Filed June 9, 1976)

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the 7th day of June in the year of our Lord one thousand nine hundred and seventy-six.

Present the Honorable

MICHAEL J. KELLY
Presiding Judge
WILLIAM R. BEASLEY
S. JEROM BRONSON
Judges

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

-vs-

Docket No. 24792
L.C. No. 74-001795-FY

LINZIE GARDNER,
Defendant-Appellant.

In this cause defendant-appellant has filed a brief on the merits in support of an appeal, and plaintiff-appellee having filed a motion to affirm pursuant to GCR 1963, 817.5(3), and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion to affirm be, and the same is hereby GRANTED for the reason that the questions sought to be reviewed are so unsubstantial as to need no argument or formal submission.

STATE OF MICHGAN—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in

said cause, that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 9th day of June in the year of our Lord one thousand nine hundred and seventy-six.

(s) RONALD L. DZIERBICKI
Clerk

APPENDIX "F"
NOTICE OF PRODUCTION OF ADMISSION
(Dated November 13, 1974)
PRODUCTION OF ADMISSION

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF JACKSON

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

-VS-

File No. 001795

LINZIE GARDNER and
MICHAEL DAVID KIDDER,
Defendants.

EDWARD J. GRANT (P14272)
Attorney for Plaintiff
WILLIAM F. GOLER,
Attorney for Defendants

TO: The Said Court and
TO: The Defendants by his Attorney

NOTICE IS HEREBY GIVEN that it is the People's intention to use and introduce into evidence at any trial of the above named cause evidence of certain statements made by the Defendant on July 29, 1974 in the presence of: D/Sgt. Darwin Nystrom, whose address is Michigan State Police Post #41, Jackson, Michigan, respectively, said statements being substantially as follows:

"Inmate Linzie (NMN) Gardner was interviewed this AM, Monday, July 29, 1974, in the M.S.P. Office inside the walls at S.P.S.M. He was first advised of his Miranda Rights and advised he understood them all. Also was willing to talk about the case without having an attorney present. He again brought up his "ALIBI" about the cut over his right eye,

stating that he and inmate George Colby, C/M, had been wrestling on the night of Friday, July 19th, and Colby's head came backwards into his glasses causing this injury which in turn accounts for the blood on his person and shirt, etc. He said he knew he was going to get convicted on this assault but said he didn't have much to lose, anyway, cuz he was already doing life for Murder and this would mess up his chances of any Parole. He said he was with Michael Kidder at all times that night, Friday, July 19, but denied being in the Carpenter Shop. I told him I would be willing to check out any alibi he had or interview any witnesses he might have. He told me to talk with George Colby and 'he will confirm the wrestling and the cut over my eye and this will prove I wasn't involved in this attack on the Guard'. I told him I intended to interview inmate Colby this date. Linzie told me earlier that he wanted to 'do something for Kidder' if he could."

(s) EDWARD J. GRANT
Assistant Prosecuting Attorney
464 County Building
Jackson, Michigan 49201

Dated: November 13, 1974.